

The Honorable Lisa P. Jackson
Administrator
U. S. Environmental Protection Agency
Water Docket, Mailcode: 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Chesapeake Bay TMDL -- Docket no. EPA-R03-OW-2010-0736

Dear Administrator Jackson:

It is critical for our environment, our economy, and our quality of life that we restore the Chesapeake Bay to health. Without strong leadership from the Environmental Protection Agency, in the form of this TMDL and aggressive backstop provisions, the Bay will continue to decline.

1000 Friends of Maryland works to protect Maryland's natural areas and open spaces, enhance the quality of life in our communities, create strong cities and towns, and improve public transportation through strategic public participation, education, research and advocacy. We are committed to realizing the goals of smart growth through supporting development that revitalizes our communities, protects our environment, and promotes a better quality of life while opposing policies that allow continued degradation through poorly-planned growth.

1000 Friends respectfully submits these comments in support of the TMDL.

I. Voluntary Action Is Not Enough

Years of voluntary restoration measures by the States have failed. It is time for strong action and real leadership from the EPA. The EPA, along with the Chesapeake Bay states, has worked for decades in a cooperative manner through a transparent and public process to reduce pollution leading to the Chesapeake Bay. Unfortunately, water quality goals set in the 1980s and in 2000 have not been met, triggering the development of the TMDL. In addition there is a clear and lengthy record of EPA, and the states, going to considerable lengths to ensure that both technical and economic attainability were addressed during this process. The new Chesapeake Bay tidal water quality standards are both scientifically valid and protective under the Clean Water Act, and at the same time, are economically and technically attainable.

Despite years of study and promises, the voluntary approach to Bay restoration has officially failed. A brief history of bay restoration efforts shows that the voluntary approach has been in place for almost forty years:

- 1972: U.S. Senator Charles “Mac” Mathias (R-Md) introduced legislation directing the EPA to embark on a major research project to determine the Bay’s problems and make recommendations on how to solve them.
- September 1983: the EPA released a lengthy report, *Chesapeake Bay: A Framework for Action*. The report also provided an innovative blueprint for the intergovernmental, inter-jurisdictional “Chesapeake Bay Program” that was formed in December when the

Chesapeake Bay Agreement of 1983 was signed by a group that would be known as the Chesapeake Executive Council – the governors of Maryland, Pennsylvania and Virginia, the Mayor of the District of Columbia, and the Administrator of the EPA.

- 1987: Congress passed the reauthorization of the Water Quality Act of 1987 (Clean Water Act or “CWA”), which included a new section entitled “Chesapeake Bay”. This provision, known as Section 117, basically codified the Chesapeake Bay Program and authorized Congress to continue funding the restoration effort at \$13 million annually.
- December 1987: the Chesapeake Executive Council signed the *1987 Chesapeake Bay Agreement*, which for the first time included specific quantitative goals and commitments. The centerpiece of the *Agreement* was a goal to reduce nutrient pollution to the Bay by 40% by 2000.
- 1992: The *1992 Amendments to the Chesapeake Bay Agreement* was signed by the Council and “capped” the 40% reduction goal after 2000. In addition, the 1992 *Amendments* recognized the need to reduce nutrients in the tributaries, and called for the states to develop “tributary-specific strategies” on how to meet the nutrient reduction goal. The states all drafted tributary strategies in the late 1990’s which were not required to be reviewed or approved by anyone outside of state government. The *Amendments* also recognized the need for “intensified efforts to control nonpoint sources of pollution, including agriculture and developed areas...”, as well as the need to engage Delaware, New York and West Virginia in the efforts to reduce nutrients in the tributaries.
- 1998: A lawsuit filed by the American Canoe and American Littoral Society against EPA alleged Virginia was not timely and complete in listing its Clean Water Act Section 303(d) impaired waters and preparing TMDLs for those waters, and that EPA failed in its non-discretionary duty under the Clean Water Act to take over when the state had failed to do so. The lawsuit was settled with a consent agreement in the Federal Eastern District of Virginia court on June 11, 1999. Under the terms of the court agreement, EPA would ensure that Virginia completed its listing of impaired waters and developed TMDLs for all waters on the 1998 list by May 1, 2010. If Virginia did not do so, EPA would complete them no later than May 1, 2011.
- 1998: the Chesapeake Executive Council adopted Directive 98-2, which directed the Bay Program to develop a new Chesapeake Bay agreement for 2000, and to present a draft set of options and recommendations to the Council in 1999. The new language made the intent to meld the voluntary and regulatory approaches clear.
- 2000: The Chesapeake Executive Council signed the *Chesapeake 2000* agreement. Although the 40% nutrient reduction goal from 1987 was still not met, the Chesapeake Bay Program adopted new stronger goals, and set up a clear path of regulatory and voluntary actions to ensure that the 2010 clean up goals would be met. Both Delaware and New York signed an MOU with the other Chesapeake Bay Program partners and agreed to adopt the Water Quality goals of the *Chesapeake 2000* agreement – West Virginia followed suit in 2002.
- April 25, 2003, Virginia’s Secretary of Natural Resources Tayloe Murphy sent a memorandum to all of the Bay Program partners. The Memorandum, *Summary of Decisions Regarding Nutrient and Sediment Load Allocations and New Submerged Aquatic Vegetation (SAV) Restoration Goals*, clearly laid out the allocations which were to guide the development of state specific tributary strategies by 2004. These allocations were “TMDL-like”, and are very similar to EPA’s proposed TMDL nutrient allocations

released earlier this year and again as part of this draft TMDL.¹ All of the Bay states developed updated tributary-specific strategies, most final in 2004. For the past seven years all of the states have known what their load reduction allocations would be, and have developed strategies to meet them.

- 2005: Technical work on the TMDL actually began unofficially with the convening of the Chesapeake Bay Reevaluation Steering Committee (now known as the Water Quality Goal Implementation Team) whose initial focus was on updating and revising the watershed and water quality models.

At the 2007 Chesapeake Executive Council meeting, Maryland's Governor Martin O'Malley, chair of the Chesapeake Executive Council, formally announced that the Chesapeake Bay Program would not meet its water quality goals by 2010. This failure to meet the 2010 restoration goals was acknowledged again in 2008 at the annual Council meeting, when EPA revealed that the current restoration pace would not meet the nitrogen goals until 2034 and the phosphorus goals until 2050. In June 2008, the Principals' Staff Committee of the Chesapeake Bay Program formally requested that EPA accelerate the Bay TMDL so it takes effect no later than December 31, 2010 – not May 1, 2011.² EPA agreed to the request from its partners and pledged to finalize the Bay TMDL by the end of 2010.

Removing the Bay from the Section 303(d) list would have avoided the need for development of a TMDL for the Bay. The failure to meet that deadline triggered the court ordered obligations found in the *American Canoe* and *Kingman Park* consent decrees and the MOU with Maryland to develop a Bay TMDL (discussed in further detail below).

II. The TMDL Is Legally Required

While the history of the Chesapeake Bay restoration effort illustrates decades of work to address water quality issues, the legal history demonstrates EPA's authority to develop the TMDL in the absence of the Bay states' ability to meet water quality goals. EPA has accurately set forth the statutory and regulatory basis for its proposed TMDL in Section 1.4 of the draft TMDL entitled "Legal Framework for the Chesapeake Bay TMDL" as well as relevant consent decrees issued by federal courts in Virginia, the District of Columbia and Delaware, an MOU with respect to the TMDL for Maryland's portion of the Chesapeake Bay and its tidal tributaries and a Settlement Agreement resolving litigation with the Chesapeake Bay Foundation seeking issuance of a Bay-wide TMDL.

Section 303(d) of the Clean Water Act

EPA's statutory authority to develop the Bay wide is derived from Section 303(d) of the Clean Water Act. Sec. 303(d) of the Clean Water Act requires states, in the first instance, to identify impaired waters and develop "TMDLs". 40 C.F.R. § 130.7(d). If a state clearly indicates

¹ Using the Phase 5.3 Watershed Model, implementation of the Tributary Strategies is expected to result in annual loads of 189.7 million pounds of total nitrogen, 14.2.5 million pounds of total phosphorus and 6.4 billion pounds of sediment compared to the draft TMDL caps of 187.4 million pounds, 12.5 million pounds and 6.3 billion pounds, respectively.

² PSC Meeting minutes June 18-19, 2008

through inaction or otherwise that it will not be able to develop the TMDL, then the duty to prepare the TMDL shifts to EPA.³

The line of decisions stemming from *Scott v. Hammond*, 741 F. 2d 992 (7th Cir. 1984), clearly established that the duty to develop TMDLs for impaired waters transfers to EPA through the mechanism of a “constructive submittal” of an inadequate TMDL by the state. *See, e.g. Kingman Park*, 84 F.Supp. 2d 1-2; *American Canoe Ass’n*, 30 F. Supp. 2d at 919-22; *Alaska Ctr. for the Env’t*, 762 F. Supp. at 1426-29. Otherwise, a state could ignore its duty to prepare restoration plans for impaired waters forever, so long as it did not actively submit inadequate plans to EPA for review and approval, clearly not what Congress intended in enacting the Clean Water Act. As the court in *Kingman Park* recognized, Congress could not have meant for EPA to sit idly by for more than a decade while states flagrantly violate their statutory mandates. *Kingman Park*, 84 F.Supp. 2d at 7.

Here, not only have none of the Bay jurisdictions developed TMDLs for either their portions of the Bay (Maryland and Virginia) or their tributaries to the Bay, but they have affirmatively asserted that they were not able to develop the TMDL on their own, and invited EPA to assume the lead and take over developing the Bay TMDL⁴. Further, states agreed that a “state by state” approach to develop the TMDLs was scientifically and administratively less desirable than continuing to use a regional approach as they did with the water quality criteria. The well established doctrine of “constructive submission” of an inadequate TMDL by a state, which triggers EPA’s duty to take over, coupled with the states’ express request in this case that EPA take the lead in developing the Bay-wide TMDL, provide ample authority for EPA’s action in doing so.

Further, EPA often takes the lead role in developing TMDLs for interstate waters. *See Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517 (9th Cir. 1995) (OR, WA and ID listed the Columbia River as impaired by a toxic compound, dioxin, but decided against developing TMDLs on their own. “Instead, after consultation and involvement in the development of the draft TMDL, the states requested the EPA to issue the proposed and final TMDL as a federal action under the authority of sec. 1313(d)(2).” The Columbia River TMDL for dioxin was upheld in the face of challenges filed by both environmentalists and industries.). Rivers that

³ *See, e.g., Scott v. Hammond*, 741 F. 2d 992 (7th, Cir. 1984) (holding that lengthy inaction on the part of a state can constitute a ‘constructive submittal’ of an inadequate TMDL, thereby transferring the duty to prepare to EPA); *Kingman Park*, 84 F.Supp. 2d 1, 2; *American Canoe Ass’n, Inc. v. United States Env’tl. Protection Agency*, 30 F. Supp. 2d 908, 919--22 (E.D. Va. 1998) (holding that EPA must take action to develop TMDLs for states that fail to do so); *Alaska Ctr. for the Env’t v. Reilly*, 762 F. Supp. 1422, 1426--29 (W.D. Wa. 1991) (“Congress intended that EPA’s affirmative duties be triggered upon a state’s failure to submit a list or any TMDL at all.”); *cf Miccosukee Tribe of Indians v. United States Env’tl. Protection Agency*, 105 F.3d 599, 602--03 (11th Cir. 1997) (holding that, despite the lack of an actual submission from Florida indicating that it had changed the water-quality standards, EPA’s nondiscretionary duty under 33 U.S.C. § 1313(d)(4)(B) would be triggered if Florida had actually altered its water-quality standards).

⁴ This decision was formalized at the meeting of the Principals’ Staff Committee (PSC) on October 1, 2007. It was agreed that the Bay watershed TMDLs would be developed jointly between the six Bay watershed states, the District of Columbia and EPA, and then established by EPA. It was further agreed that the Water Quality Steering Committee would draft nutrient and sediment cap load allocations by tributary basin and jurisdiction, and the Principals’ Staff Committee would formally adopt these allocations.

form borders between states, such as the Savannah River, or that flow from one state to another, such as the Arkansas, or bays that receive pollutants from numerous states, such as the Chesapeake, are good candidates for EPA-developed TMDLs.

Prior TMDL Litigation and Agreements

As discussed above, Section 303(d) of the Clean Water Act requires states to identify water quality limited segments of water bodies within their borders and to establish the total maximum daily load of pollutants that each water quality limited segment can assimilate,, 33 U.S.C.S. § 1313(d)(1)(C)); this duty transfers to EPA, however, when the states fail to act.. In 1997, EPA was sued because it did not act when Virginia failed to develop TMDLs for impaired water bodies. *American Canoe v EPA*, 30 F. Supp. 2d 908 (E.D. Va. 1998) (hereafter “*American Canoe I*”). That matter was settled via a consent decree approved by the federal court. *American Canoe v. EPA*, 54 F. Supp. 2d 621 (E.D. Va. 1999) ((hereafter “*American Canoe II*”).

EPA was also sued for failing to ensure that the District of Columbia identify impaired bodies of water within its jurisdiction and developed TMDLs for those waters. *Kingman Park Civic Association v EPA*, 84 F. Supp. 2d 1 (D. DC 1999). Like *American Canoe*, that matter was settled via consent decree which set deadlines for listing impaired water bodies and developing TMDLs for them. Those bodies of water are all tributaries to the Chesapeake Bay.

In addition, in 1996 the American Littoral Society and the Sierra Club sued EPA to ensure that TMDLs were developed for impaired waters on Delaware’s Section 303(d) list which included a tidal Bay segment, the Upper Nanticoke. The parties entered a consent decree in 1997 which required EPA to develop TMDLs if Delaware failed to do so. While Delaware adopted some TMDLs, it does not have in place a TMDL to meet the current water quality standards for the tidal Bay segment, effectively leaving that task to EPA.

A similar claim was brought concerning Maryland’s portion of the Bay. That claim was resolved via a memorandum of understanding between Maryland and EPA in 1998. Like the *American Canoe* and *Kingman Park* consent decrees, this memorandum required EPA to develop a TMDL for Maryland’s portion of the Chesapeake Bay if Maryland failed to do so by 2010. EPA’s Bay wide TMDL complies with its authority and commitment to prepare TMDLs for all of the Bay segments covered by these various consent decrees and MOUs. *See* Draft TMDL § 2.2.4.

Section 117(g) of the Clean Water Act

EPA’s authority to issue the Bay wide TMDL is also supported by Section 117 of the Clean Water Act (33 U.S.C. § 1267(g)(1)(A)-(g)(1)(B)). Use of the word “shall” makes the Administrator’s obligation mandatory. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“The mandatory ‘shall,’ ... normally creates an obligation impervious to judicial discretion”). Thus, EPA was required to develop a management plan to comply with the nutrient reduction goals of the *Chesapeake 2000* agreement. The proposed Chesapeake Bay TMDL is the most appropriate such ‘plan’ to “achieve and maintain ...the nutrient goals...and water quality requirements “referred to in Section 117(g) because it is tailored to achieving compliance with the water quality standards for nutrients and sediment. It is the principal tool

provided in the Clean Water Act for this purpose, and therefore is precisely what Congress intended that EPA should do in implementing Sections 303(d) and 117(g).

Fowler v. EPA Settlement Agreement - Requires TMDL by December 31, 2010

EPA was sued for failing to comply with Section 117(g) and the Bay Agreements. *Fowler v. EPA*, Case No. 09-cv-00005-CKK, D. D.C., January 5, 2009. That matter was settled by agreement between the parties. The agreement provides that EPA will develop a Bay wide TMDL “[b]y December 31, 2010, pursuant to 33 U.S.C. §§ 1313(d) and 1267...” Settlement Agreement Section III.A.1. Thus, EPA is also required pursuant to the settlement agreement in *Fowler* to develop a Bay wide TMDL.

EPA Has Properly Included “Backstop Allocations” in its TMDL

In its TMDL document EPA describes, thoroughly and accurately, the lengthy history leading to its development of the draft TMDL, including the legal framework (Sections 1 – 3), much of which has been summarized above. In Section 8 it describes the development by the states of their Watershed Implementation Plans, EPA’s evaluation of them, and the use by EPA of “backstop” allocations which EPA developed, based on its exhaustive modeling and data-gathering efforts, to ensure that, where the WIPs fail to demonstrate eventual achievement of the loading caps, the “backstop” allocations will do so.

Over the course of more than two decades EPA has worked closely with the states within the Chesapeake Bay watershed to develop effective strategies to restore the water quality of the Bay and to achieve compliance with water quality standards. The framework which allows each state to develop a WIP, in which the state may establish allocations for sources within its boundaries which will achieve water quality standards for each segment before EPA applies backstop allocations (which are applied only if needed), is part of that joint effort. In its WIP each state must also provide assurance that it has and will use the authority and resources necessary to ensure that its allocations will be fully implemented so as to achieve eventual compliance with water quality standards.

As discussed above, EPA has the legal authority to establish the TMDLs on its own under Sections 303(d) and 117(g) of the Clean Water Act. However, allowing the states the “first shot” at prescribing effective loading allocations for sources within their jurisdictions lets them determine which combination of point source and nonpoint source controls will provide, from their perspective, the most cost-effective or preferable approach to achieve water quality goals, provided each segment’s overall loading cap is satisfied. To the extent that a WIP does not provide a combination of load and wasteload allocations to sources and categories of sources which is sufficient to satisfy the TMDL requirements which EPA provided to the states during the summer of 2010, based on its modeling results, for any segment within its jurisdiction, EPA’s “backstop” allocations were applied so as to reasonably assure compliance, as EPA is required to do under Clean Water Act Sections 303(d) and 117(g). Given the serious deficiencies in most of the draft Phase I WIPs it was necessary for EPA to make substantial use of the backstops.

The result of this approach is that EPA is holding itself ultimately accountable for ensuring that the resulting allocations meet the requirements of Section 303(d) while allowing the states to propose allocations of their own through their WIPs. For the reasons described above, this strategy, and EPA's implementation of it, are fully supported by the Clean Water Act.

III. Pollution Loads From Growth Require Particular Attention

The decline of the Chesapeake Bay stems from human activity that has altered the landscape throughout the Bay's 64,000 square mile watershed and all of the Bay states. The population in the watershed has doubled since 1950 (now around 17 million), and much of this growth and development – leveling trees, forests and wetlands and replacing farms with subdivisions and malls — has taken place close to the Bay or to its sensitive tributaries, harming natural filters that are critical to a healthy ecosystem.

Pollution loads from growth are the one source of nitrogen and phosphorous bay-wide that is headed in the wrong direction. As the Environmental Protection Agency reported in 2007, increased pollution loads from continued development were outpacing pollution reductions from all other sectors combined.⁵

As the States create their Watershed Implementation Plans, the Environmental Protection Agency should give particular scrutiny to their efforts to minimize pollution from future growth and development.

IV. Conclusion

We have a moral and legal imperative to protect these local waters upon which 17 million people rely. The Clean Water Act, three major Bay Agreements and scores of minor ones, three consent decrees, dozens of Memoranda of Agreement/Understanding and a Presidential Executive Order all require development of a Bay-wide TMDL. It is not only legally required, but perfectly logical, appropriate and fair for EPA to develop this TMDL. Moreover, EPA has used this authority wisely, engaging in a highly transparent public process developing the TMDL (and seeking comments on the draft), providing states ample opportunity to prepare and revise draft Watershed Implementation Plans, (WIPs), and seeking to implement allocations that are substantially equivalent to those the states have had since 2003.

1000 Friends of Maryland supports the TMDL, strong backstop provisions from the EPA, and particular attention to loads from growth with a critical analysis of how the Bay states plan to accommodate future development.

Sincerely,



Dru Schmidt-Perkins
Executive Director, 1000 Friends of Maryland

⁵ Environmental Protection Agency, "Development Growth Outpacing Progress in Watershed Efforts to Restore the Chesapeake Bay," September 10, 2007.